United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1424

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RAY JONES,

Defendant-Appellant

BRIEF FOR APPELLANT

Appeal from a Judgment of the United States District Court for The Western District of New York

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UNITED STATES COURT OF APPEALS
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

Docket No. 77-1424

RAY JONES,

Defendant-Appellant.

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PRELIMINARY STATEMENT

Defendant Jones was arrested on March 11, 1977, for purchasing food stamp coupons from an undercover Sheriff's Deputy. He was indicted by a Federal Grand Jury on March 16, 1977, in a 2 count indictment alleging violations of Title 7, United States Code, Section 2023[b] for having acquired and possessed food stamp coupons having a value in excess of $100.00 in a manner not authorized by Chapter 51 of Title 7 of the United States Code or the regulations issued pursuant thereto. After various motions brought by the defense were argued and decided upon by the Court, trial commenced July 18, 1977. On July 20, 1977, the jury returned guilty verdicts on both counts.

Defendant was sentenced on September 6, 1977, to 2 years probation and a $2,000.00 fine.

STATEMENT OF FACTS

In early February, 1977, as a result of the devastattion caused by what is now commonly referred to as the "Blizzard of 77", the counties of Western New York were declared by President Carter a national disaster area. That designation entitled many area residents to special emergency food stamp relief. In Erie County alone, approximately $23,000,000.00 in food stamp coupons were distributed to nearly 1/2 of the county's 1.1 million residents.

Based upon reports of supposed illegal dealings in food stamps [26] and suspicions of other widespread abuses, the Erie County Sheriff's Department and special agents of the Department of Agriculture began a combined investigation. As a result of their combined activities, the Defendant and 11 other persons were indicted for illegally acquiring and possessing food stamp coupons which were purchased for cash and a variety of other merchandise from undercover Sheriff's Deputy Joseph Petronella.

Subsequently, United States Attorney Richard J. Arcara sent letters to 1,291 Erie County residents suspected of fraudulently obtaining food stamps in violation of the same code section with which the Defendant is charged. The letter warned those persons to return or pay for the food stamps or face legal action including possible criminal prosecution.

On the afternoon of February 25, 1977, the Defendant, the proprietor of an automobile collision repair shop, was approached at his place of business by a black man known to him as Ronnie Manns. At that time Manns explained to the Defendant that he had food stamp coupons for sale, but after the Defendant told Manns

that he was not interested in purchasing food stamps, Manns left the premises [89]. This conversation was not recorded, nor was any report made as to the contents of the conversation [74-75].

Deputy Petronella testified that the informant was a black man named James Arthur Riley, whose role in the investigation was to introduce Petronella to people who were buying food stamps illegally [29-30]. Riley, who was at the time of the investigation, on probation for life for having sold heroin to Petronella, received $1,300 for his assistance in the investigation. The Defendant testified that he did not know Riley and had never seen him prior to the audibility hearing [87-88].

Petronella testified on cross-examination that Riley, a reliable informant, told him that he had had numerous food stamp transactions with the Defendant. However, Petronella made no inquiry as to the dates, times, places, or amounts and made no independent investigation to determine the validity of Riley's information [65]. No formal report was ever made regarding this information [27-64], nor was said information presented to the Grand Jury [66]. He also testifies that he made no independent check as to the Defendant's activities prior to February 25, 1977, nor did he attempt to determine whether or not the Defendant has a criminal record [63].

Petronella testified that he arrived at the Defendant's shop on the 25th, accompanied by Riley and another undisclosed informant. Riley went into the premises for approximately a minute, came out, raised his arm signalling Petronella to go in, and Petronella proceeded into the shop, without speaking to Riley, clad in a long rabbit fur coat. Petronella then contradicted himself in testifying that Riley was in the shop approximately 8 min-

utes [33]. Petronella was equipped with a self-contained tape recording device hidden underneath his pants on his side, which he was able to turn on and off [34-36]. Petronella further testified that he attempted to sell the Defendant $1,000 worth of food stamps but that the Defendant only purchased $500 worth, at a cost of $150 [37-38]. He also testified that the tape recording was complete and accurate with respect to the conversation he had had with the Defendant that day [37]; also that he was with the Defendant approximately 3 to 5 minutes, and no one else was present [39-40].

The Defendant testified in the alternative that Manns was present during the entire transaction [90], and evidenced by the tape recording, it was Manns who was laughing in the background [102-03]. That in response to Petronella's statement, "I understand you want food stamps", the Defendant replied again that he wasn't interested. The Defendant admitted that he did finally purchase the food stamps but that in doing so he was acting out of fear. He testified that in the past his life had been threatened in an extortion attempt which led to the arrest of a man at his premises. That he was the victim of an armed robbery in his shop during which he was bound and gagged at the point of a shotgun and a straight razor. His place of business had been burglarized approximately 1 dozen times. Because of these occurrences, he had numerous contacts with officers of the City of Buffalo Police Department who advised him how to act with people who might have some kind of criminal activity in mind. The Defendant testified that at first he thought he was being robbed again because Petronella's left hand remained inside the pocket of the long rabbit fur coat, the same way the shotgun had been concealed dur-

ing the previous robbery. He thought that the conversation going on was merely a "front"; and therefore, refused both the price and the amount. It was at this point while the Defendant had his revolver drawn behind his back that Petronella threw $500 worth of food stamps on his desk. He testified that he then had to decide either to buy the food stamps or make a citizen's arrest. Rather than jeopardizing his own life and theirs, he decided to go along with the sale [90-95].

Petronella further testified that he called the Defendant on the telephone on February 28, 1977, to tell him he had another $1,000 in food stamps for sale, to which the Defendant replied that he couldn't handle that many, but would take $200 worth. He arrived at the Defendant's place of business by himself, this time equipped with electronic transmitter which again he was able to turn on and off. The Defendant purchased $200 worth of food stamps for $65 [44-49]. Petronella again testified that the tape recording accurately reflected the conversation he had with the Defendant on that date [50-51].

The Defendant testified that Petronella was not alone when he returned on the 28th, but rather, there was an unidentified black male driving the automobile [96-97]. Both Robert Barton and Michael Barton, who were in the Defendant's shop at the time corroborated the fact that a black male was driving the automobile [73-85] Again the Defendant was alarmed and chose to go along with the program as presented to him. He testified that Petronella again asked him to call his friends to see if they wanted stamps. That he attempted to trade him $200 in stamps for his revolver or any other unregistered pistol that he might have. That Petronella asked to trade stamps for merchandise to which the Defendant re-

plied he didn't know what he meant by that, all he did was fix cars for a living, that all he dealt in was bent fenders [100-01].

Deputy Petronella further testified that he called the Defendant twice more on March 8 and March 9, 1977, to solicit further sales and that the Defendant stated he would pay $1,000 for $4,000 in food stamps [52-56]. Those calls, however, were not overheard, recorded, or officially reported [59-62]. The Defendant, in the alternative, denied that these calls had taken place. [103-105].

The Defendant, on February 20, 1977, applied for food stamps under the emergency program, claiming only himself as a dependent and received $50.00 in food stamps [126].

Raymond Schmit of the City of Buffalo Identification Bureau testified that the defendant did not have any criminal arrest record in the City of Buffalo. [325-328].

POINT I

AS A MATTER OF LAW THE APPELLANT DID NOT VIOLATE TITLE 7, CHAPTER 51, SECTION 2023(b) OF THE UNITED STATES CODE, AND THE INDICTMENT SHOULD THEREFORE BE DISMISSED.

It is not contested that the defendant did acquire and possess Food Stamp Coupons, but it is contentended that same were not acquired and possessed in a manner not authorized by Title 7 Chapter 51, Section 2023(b) of the United States Code, and in regulations issued pursuant thereto. That the government conferred upon the defendant the status of an eligible Food Stamp Coupon recipient.

Pursuant to the United States Code the Secretary of Agriculture may provide for the purchase and issuance of Food Stamps to such person or persons, and at such time and in such manner as he deems necessary or appropriate to protect the interest of the United States, or to insure enforcement of the provisions of this Chapter, or the regulations issued pursuant to this Chapter. 7 U.S.C.A. §2023(a). The Secretary has also been given the express power to establish temporary emergency standards of eligibility, without regard to income and other financial resources, for the duration of an emergency or disaster. 7 U.S.C.A. §2014(b).

In the instant case, Detective Petronella, acting under the direction and supervision of the Department of Agriculture became in effect an authorized "Coupon Vendor", vested with the

power to legally issue Food Stamp Coupons to designated recipients. Likewise, the Department of Agriculture Agents, acting under the authority of the Secretary of Agriculture, specifically approved the issuance of Food Stamp Coupons by Detective Petronella to the Defendant.

It is important to note at this juncture, that the purchase of Food Stamp Coupons at a discount is not in itself a violation; but rather, the normal method by which such Stamps are issued. Similarly, the Food Stamp Coupons are not contraband per se, and the mere possession of same is also not by itself a criminal violation.

It is submitted therefore, that since Agents of the Department of Agriculture, acting on behalf of the Secretary of Agriculture selected the procedure through which the Defendant acquire and possess Food Stamp Coupons, said Coupons were not acquired and possessed in a manner not authorized, and the government should be estopped from prosecuting him therefor.

POINT II

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN THE APPELLANT'S CHALLENGES FOR CAUSE WITH RESPECT TO PROSPECTIVE JURORS ELEANOR KIMBALL AND GERALD TEDAK, AND THE JUDGMENT SHOULD BE REVERSED.

The Sixth Amendment of the United States Constitution guarantees to the accused the right to a fair and impartial trial by fair and impartial jurors.

An "objectionable juror" who may be removed on a challenge for cause is one against whom such cause for challenge exists as would likely affect his or her competency or impartiality at the trial. As a general rule it is error for the court to force a party to exhaust his peremptory challenges on persons who should be excused for cause. United States v. Neil, 526 F. 2d 1223.

During voir dire vs. Kimball in response to the court's questions disclosed that she was a retired Federal Employee, (Selective Service), that her brother was a retired Government Attorney, and that her nephew was presently an attorney for another Federal Agency. (5 - 7). Although these facts tend to indicate that the juror might be biased in favor of the government's case, it is not argued that those facts alone are sufficient to sustain a challenge for cause. However in light of Mrs. Kimball's unsolicited response that she was "strongly against it. Getting it (food stamps) illegally or unfairly", and her own admission that she had some doubt that it might affect her ability to make a final judgment (9), clearly demonstrated the likelihood that she could not be an impartial and unbiased juror.

Mr. Tedak's answers, like Mrs. Kimball's, tended to indicate that he might be biased in favor of the government's position. He was currently employed by the United States Postal Service (15), and had previously been employed for 13 years by the Buffalo Special Police, a private detective agency providing uniformed security personnel. Mr. Tedak also indicated that he enjoyed working with the special police and that he had desired to become a professional policeman, but was inelligible because of his eyesight. (23). He also disclosed that his cousin was a State Trooper, and a good friend's father with whom he was acquainted was with the Erie County Sheriff's Department. (16 - 19).

When asked specifically by Mr. Wagner about the Food Stamp Program, Mr.Tedak responded that, "well, during the snowstorm, I was a little disgusted because I didn't receive it, that I couldn't receive the Food Stamps but everybody else received them." (19). He further admitted that he had bad feelings about the program and felt "funny about the food stamps".(20). In response to Mr.Wagner's question as to whether, if he were influenced at all, would he tend to feel in the government's favor or the defendant's favor, Mr.Tedak stated "it depends. I got that feeling with food stamps", and in reply to Mr.Wagner's next question stated, "a person thats eligible should get them, the ones that isn't shouldn't get them". (21).

When questioned by Mr. Costa regarding the presumption of innocence, in reply to Mr. Costa's question, "he is still presumed innocent, you accept that?", Mr. Tedak replied, "I don't know until I hear the case". When asked by Mr. Costa if he

thought that the defendant had to prove to him that he was innocent, he responded "I think so". Mr. Tedak then affirmed that answer and when asked, "even though His Honor said to you that he is presumed to be innocent?", he again replied "yes".(22).

It is submitted that the voir dire of Mr. Tedak clearly established the possibility that he would be biased in favor of the government. He also displayed very strong feelings about the Food Stamp Program. It is more importantly submitted that Mr. Tedak was incompetent to serve as a juror in that he was unable to understand the basic premise that the defendant is presumed innocent until proven guilty, despite the fact that the trial judge had previously discussed this theory no less than 7 times during the course of the voir dire.(2, 3, 4,7,8, 11, 13). This is particularly significant in that the central issue in this case related to the much more difficult concept of entrapment. Mr. Tedak having demonstrated his inability to grasp the less difficult concept of the presumption of innocence is a clear indication of the likelihood that he would be unable to sit as a fair, impartial, competent juror in this case.

Based upon the foregoing it was an abuse of judicial discretion for the trial court not to sustain challenges for cause with respect to jurors Kimball and Tedak, thereby forcing the defendant to exhaust his peremptory challenges on jurors that should have been dismissed for cause. This substantially prejudiced and impeded the defendant's rights to a fair and impartial jury in that the defendant was denied the full and effective use of its 10 peremptory challenges as provided by law.

POINT III

IT WAS ERROR FOR THE TRIAL JUDGE TO DENY THE APPELLANT'S MOTION TO SET ASIDE THE VERDICT OF THE JURY AND THE JUDGMENT SHOULD THEREFORE BE REVERSED.

One who is instigated, induced, solicited or lured by an officer of the law or someone acting at his direction, for the purpose of prosecution, into the commission of a crime which he had no intention of committing, may avail himself of the defense of entrapment.

As stated in the case of Butts v. U.S., 273 F.35, (8th Circuit 1921):

> "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it." 273 F. at 38.

The Supreme Court in Sherman v. U.S. ,356 US 369, 1958, citing Sorrells v. U.S. , 287 US 435, 1932, in restating the same principle said:

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly that function does not include the manufacturing of crime. ...Congress could not have intended that its Statutes were to be enforced by tempting innocent persons into violations."

It is submitted that the evidence in this case proves that the government's first and chief endeavor was to cause, to cre-

ate crime, in order to punish it, and it is unconscionable, contrary to public policy and to the established law of the land, to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, and lured him to commit it.

The controlling question is whether the defendant is a person otherwise innocent, whom the government is seeking to punish for an alleged offense which was the product of the "creative activity" of its own officials. Sorrells supra, 287 US at 451.

Although it is well settled that government agents may make use of deception, trickery and artifice to obtain evidence against those persons engaged in criminal conduct and ready and willing to commit further crimes, such stratagems and decoys are not permissable to ensnare the innocent and law abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the minds of the government officers, and the accused is by persuasion, deceitful representation or inducement, lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor. Newman v. U.S. 299 F 128; Sorrells supra, 287 US at 445.

As was stated in Sherman supra, 356 US at 372:

> "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal:."

To render applicable the rule that deception, trickery or artifice does not constitute entrapment, where it merely furnishes the accused an opportunity to commit a criminal act previously planned by him, it must appear that there were reasonable grounds for believing that the accused is engaged in or intended to engage in the unlawful activities, ... 22 CJS Criminal Law §45(2), at 145.

The facts, as in the instant case, that the defendant had no previous criminal record or reputation, and although presented with opportunity never before engaged in any criminal activity, tend to support the defense of entrapment. The defense is further supported by the testimony of character witnesses representing a cross section of the community including among others, a retired assistant United States Attorney, the President of the local Businessmens Association of which the defendant is a member, a City of Buffalo school teacher, and a Detective with the City of Buffalo Police Department, all of whom gave evidence to the effect that the defendant was an honest, industrious, hardworking, law abiding citizen, active in community affairs. The defendant's good character and lack of criminal reputation is further evidenced by the fact that at the time of the transactions in question the defendant was licensed by the County of Erie to carry a concealed weapon. It is submitted for the court's consideration that had the government agents truly believed that the defendant was engaged in any type of ongoing criminal activity, they would have conducted a thorough search incident to the arrest, which in fact they did not.

Inducement having been shown, the burden is on the government by way of reply to the defense of entrapment, to prove a sufficient cause for the inducement. US v. Masciale, 236 F. 2d 601, 2nd Cir. 1956, US v. Henry, 417 F. 2d 267, 3nd Cir.1969. As Justice Learned Hand stated in US v. Sherman, 200 F. 2d 880 2nd Cir. 1952:

> "If the prosecution sees fit to set the accused in motion, it is called upon to make good its excuse." 200 F. 2d at 883.

With respect to the inducement itself, Justice Frankfurter speaking for the minority in Sherman, Supra, stated that:

> "...in holding out inducements they (the police) should act in such a manner as is likely to induce to the commission of crime only these persons (those engaged in criminal conduct and ready and willing to commit further crime should the occasion arise) and not others who would normally avoid crime and through self-struggle resist ordinary temptations. ... Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime." 356 US at 384.

Government agents can not therefore be allowed to employ extraordinary temptations or inducements to commit crimes.

In short, it is contended that the government's conduct created more than a substantial risk that the offense would be committed by a person other than one ready to commit it.

In the instant case the uncontradicted proof is that the government agents solicited the defendant to purchase at a very attractive discount, a commodity as easily negotiable as United States currency at its full face value, without the aid of any other criminal contacts or conspiracy. The evidence also established that the defendant purchased only $700.00 worth of stamps, which he redeemed for his own personal use, also negating the fact that he was engaged in the "blackmarketing" of food stamps.

As cited in US v. Bishop, 367 F.2d 806, 2nd Cir. 1966:

> "The defense of entrapment represents, as Judge Learned Hand indicated, two distinct issues:"(1) did the agent entice the accused to commit the offense charged in the indictment; (2) if so,was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense.: U.S. v. Sherman, 200 F. 2d 880, 882 (2d Cir. 1952). On the first of these issues - "inducement" - the accused bears the burden, ibid., the government, however, must prove the second issue - "predisposition" - beyond a reasonable doubt, See U.S. v. Riley, 363 F.2d 955,(2d Cir. July 12,1966)." 367 F.2d at 809.

This court has previously held that once the defendant has demonstrated inducement, the government may prove propensity by showing (1) an existing course of criminal conduct similar to

the crime for which the defendant is charged, (2) already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime charged as evidenced by the accused's ready response to the inducement. US v. Viviano, 437 F.2d 295, (2nd Cir.1971); Sherman v. U.S. supra, 200 F. 2d at 882; U.S. v. Becker, 62 F.2d, 1007, 1008, (2nd Cir. 1933).

It was made evident throughout the trial that the prosecution was attempting to prove the defendant's propensity by the third of the aforementioned criterias, as it introduced no real evidence of either an existing course of criminal conduct or an already formed criminal design. While in the first two instances concrete evidence can be used to demonstrate the defendant's predisposition, in the third instance, the defendant's state of mind may only be inferred from evidence of his subsequent actions.

As the prosecution has the burden of proving the defendant's predispostion or state of mind prior to the initial ontact beyond a reasonable doubt, substantial evidence from which those inferences can be made need be introduced. Much more than the mere fact that the defendant committed the crime is required to prove predisposition. The standard of ready compliance necessary to defeat the defense of entrapment requires evidence of a wholehearted desire on the part of the defendant to engage in a criminal activity. This concept was well set forth by the United States Court of Appeals for the 5th Circuit in the case of U.S. v. Dickens, 524 F. 2d, 441,

1975, which stated:

> "To infer readiness and willingness from the transactions in question (as opposed to inferring it from prior occurrences), requires not merely evidence that the accused was shorn but evidence that he went all too eagerly to the shearing shed." 524 F. 2d at 446.

There must therefore be sufficient evidence independent and unrelated to the inducement so that the jury can conclude that the evidence of the defendant's eagerness to deal in the transaction was not itself a product of the inducement.

Stated another way, the mere fact that the government produces evidence that the defendant was willing without persuasion to engage in a criminal activity, is not sufficient to prove beyond a reasonable doubt the additional necessary element that the defendant was ready and awaiting any propitious opportunity to commit the crime.

The instant case is unlike the many narcotics and bribery cases heretofore argued before this court. The defendant's willingness is not corroberated as in the narcotics cases, by ready access to a supply of narcotics, or in the bribery cases where the defendants had a strong motive to seize the opportunity to conceal past misconduct.

In Viviano, Supra. 437 F.2d at 299, where the defendant was accused of unlawfully offering a gratuity to, and conspiring to bribe an inspector of the Internal Revenue Service, this court

found that there was no evidence whatsoever to suggest that the defendant displayed the slightest hesitance in taking advantage of the solicitation, thereby defeating the defense of entrapment.

In U.S. v. Henry, Supra, 417 F. 2d at 270, where the defendant was accused of the unlawful sale of narcotics, this court found that in addition to the government's testimony that the defendant had previously offered to arrange sales of heroin, the defendant's own testimony clearly demonstrated his willingness, without persuasion, to undertake the unlawful transaction. The defendant admittedly responded without hesitation "I will",when solicited to deliver the narcotics. The court further found that the defendant did not urge,on the record, any contradiction of the factual evidence of his readiness and willingness to enter into the unlawful transaction.

Likewise in the case of US v. Licursi, 525 F. 2d, 1164, (2d Cir. 1975), where the defendant was accused of aiding and abetting in the distribution of cocaine, this court found that the defendant participated in the transaction with great zeal. He evidenced considerable interest in the success of the transaction and went to great lengths to facilitate its consumation. When the undercover agent expressed doubts, the defendant reassured him and coaxed him on. Based upon the entire record the court found that the defendant did not contradict the evidence of his predisposition, which was substantially demonstrated by his own uncontradicted testimony. The facts in this case also include the additional element of the defendant's ready access to the supply of cocaine.

In light of the nature of the inducement, the lack of reasonable justification for same, the government's failure to have the alleged informant testify as to his part in the inducement and to contradict the defendant's testimony, there was insufficient evidence independent of the inducement to establish that this activity was but another instance of the kind of conduct which the defendant was prepared to engage in, if afforded an opportunity, or that it only provided the means for the defendant to effectuate or realize his own then existing purposes.

The conception of, and the intention to do the acts with which the defendant was accused, did not originate in his mind or with him, but were the products of the fertile brains of the officers of the government, which they instilled into the mind of the defendant, and by deceitful representations and importunities lured him to put into effect.

There was, therefore, insufficient evidence of predisposition upon which a correctly charged jury, fully understanding the theory of entrapment, could have established the defendant's guilt beyond a reasonable doubt.

POINT IV

THE DEFENSE OF ENTRAPMENT WAS ESTABLISHED AS A MATTER OF LAW AND THE JUDGMENT SHOULD BE REVERSED.

Aside from the traditional theory of entrapment focusing primarily on the predisposition of the defendant as expounded by the majority of the Supreme Court in Sorrells and Sherman supra, very strong minorities in both those cases urged in the alternative that the primary focus should be on the propriety of police behavior in inducing the defendant to commit a crime.

This court in interpreting Lopez v. United States, 373 U.S. 427, 434-435, 83 Sup. Ct. 1381, 1385-1386,10 L.Ed.2d 462, 1963 held that the Supreme Court has expressly declined to disavow permanently that viewpoint which focusses on government conduct. United States v.Morrison,348 F.2d 1003, 1004 2d Circuit 1965. Such being the case the issue was again discussed in United States v. Henry supra, United States v. Smalls, 363 F.2d 417, 2d Circuit 1966, United States v. Cuomo, 479 F. 2d 688, 2d Circuit 1973, and United States v. Archer, 486 F. 2d 670, 2d Circuit 1973. Archer, which is akin to the instant case in that both cases involve a combined federal and local investigation based upon a generalized belief of widespread criminal activity. Although the court reversed the judgment with instructions to dismiss the indictment based upon a ground other than government misconduct, the court did hold:

> "...there is certainly a limit to allowing governmental involvement in crime.",486 F. 2d at 676.

The United States District Court for the Southern District of New York in the case of United States v. Dillet, 265 F. Supp

980, 1966, acquitted the defendant in a prosecution for the sale of narcotics where there was no direct evidence of any prior or subsequent sales and where there was insufficient evidence to rebut the defendant's claim that the contraband had been supplied to him by a paid government informant. Although in the instant case food stamps are not contraband perse, they in effect become contraband if as the government contends, they were acquired or possessed in an unauthorized manner.

The 5th Circuit Court of Appeals citing Dillet supra, found entrapment as a matter of law where no evidence was presented to rebut the defendant's testimony that the narcotics which he sold to a government agent were purchased and supplied to him by a paid government informant, **U.S. v. Bueno**, 447 F.2d 903, 1971.

In United States v. Chisum, 312 F.Supp.1307, 1970, the District Court for the Central District of California on the defendant's motion to dismiss the indictment on the grounds of entrapment, where the defendant purchased counterfeit money from a government agent, held that where the government supplies the contraband, the receipt of which is illegal, the government cannot be permitted to punish the one receiving it. The court held that the government cannot be permitted to punish the one receiving it. The court held that such conduct constituted the manufacture of crime by the government and entrapment as a matter of law in spite of the finding that the intent arose solely in the mind of the defendant, without government inducement. The United States District Court for the Eastern District of Louisiana, in the case of U.S. V. Mahoney, 355 F.Supp.418, 1973, involving the prosecution for the possession of marijuana, held that the "government

misconduct" theory is a valid defense to a prosecution separate and distinct from the traditional doctrine of entrapment. In so holding the court found that once an intollerable degree of government participation in a criminal enterprise is shown, a predisposition to commit the crime on the part of the defendant does not defeat the entrapment defense. Citing Chisum supra, the court found that the government in fact provided the contraband, the receipt of which was illegal, which in itself constituted the offense.

In U.S. v. Russell, 411 U.S.423, 93 Supreme Court 1637, 36 L.Ed. 2d , 366 the Supreme Court found that the defense of entrapment was not available where a government agent provided a harmless chemical, which was an essential element to the manufacture of methamphetamine, to a defendant obviously predisposed and engaged in an ongoing criminal activity. Justice Rehnquist speaking for the court, stated however that:

> "...while we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from envoking traditional process to obtain a conviction, the instant case is distinctly not of that breed. ...the law enforcement conduct here stops far short of violating that "fundamental fairness shocking to the universal sense of justice", mandated by the due process clause of the Fifth Amendment.", 36 L.Ed. 2d at 373.

thereby affirming the misconduct theory of entrapment as a viable defense assuming that the proper factual situation is pre-

sented. In a dissenting opinion Justice Douglas with Justice Brennan concurring, held that this was such a case. Citing Sorrells, Bueno and Chisum supra, they found that the alleged criminal offense was the fruit of a criminal conspiracy on the part of the government to induce its commission. A separate dissenting opinion by Justice Stewart with Justices Brennan and Marshal concurring also found entrapment as a matter of law, based upon the misconduct theory, regardless of the defendant's predisposition.

In United States v. Oquendo, 490 F.2d 161, 1974, in a prosecution for the distribution of heroin, the court determined that the ruling in United States v. Bueno supra, was still viable in light of United States v. Russell supra, holding that:

> "...the Supreme Court implicitely acknowledged that the facts in Russell did not fall within the Bueno rationale, 411 U.S. at 431, 93 Supreme Court at 1642, 36 L. Ed. 2d at 373", 490 F.2d at 163.

Like Bueno, the court in Oquendo characterized the government as buying heroin from itself. Russell was similarly distinguished in Mahoney supra. See also United States v. Mosley, 496 F.2d 1012, 5th Circuit 1974.

The most recent case on the subject, Hampton v. United States, 96 Supreme Court 1646 - 1976 still leaves the door open for the defense of government misconduct. In that case involving a prosecution for the distribution of heroin Justice Rehnquist speaking for the court, joined in his opinion by the Chief Justice and Justice White, citing Russell supra stated:

"We ruled out the possibility that the defense of entrapment cound ever be based upon governmental misconduct in a case such as this one, where the predisposition of the defendant to commit the crime was established." 96 Supreme Court at 1649.

Justices Powell and Blackmun while concurring in the judgment, stated in a separate opinion that they were unable to conclude that:

"...no matter what the circumstances, neither due process principles nor out supervisory power could support or bar to conviction in any case where the government is able to prove predisposition." 97 Supreme Court at 1652.

Justice Brennan in a dissenting opinion with Justices Stewart and Marshall concurring, held that the conviction should be barred as a matter of law in that the subject of the criminal charge was the sale of contraband provided to the defendant by a government agent, that even if the defendant's guilt was admitted, the methods employed on behalf of the government could not be countenanced.

In United States v. Reifsteck, 636 F. 2d 1030, 8th Circuit 1976, the court held:

"Defendant's second argument, that the degree of government participation in the crime was so fundamentally unfair as to constitute entrapment as a matter of law, is not foreclosed by Hampton. ...However, five Justices agreed that a Court in its supervisory capacity or under due process

principles, could conceivably bar a conviction of a predisposed defencant because of outrageous police conduct."

Similarly this court in the recent case of United States v. Steinberg, 551 F.2s 510, 2d Circuit 1977, held that

"The Suprme Court has not yet decided whether truly outrageous overreaching by government investigators in an entrapment case might warrant an acquital regardless of the defendant's personal guilt."

Furthermore the present case is clearly distinguishable from Russell and Hampton supra, wherein the defendant's guilt was either conceded or established, in that there is a genuine question as to the defendant's predisposition.

As previously stated the nature of the inducement in the instant case created an extraordinarily high risk of probability that the proffer would be accepted by someone other than an individual predisposed to engage in that type of activity.

If the defendant was truly suspected of being engaged in the black marketing of food stamps it is submitted that the proper approach would have been to attempt to induce the defendant to sell food stamps to an undercover agent. Such a procedure would have induced the risk that an otherwise innocent would become involved. Furthermore it was not reflected on the record that the defendant was a part of a highly organized sectet society of criminals so well concealed and insulated so as to require the use of such methods.

The instant case presents a factual situation wherein overzealous government agents far exceeded the recognized limits of the theory of entrapment. They did not merely afford the defendant the facility and opportunity to commit the crime, but in fact created the offense themselves. The government agents carefully planned and set into motion their entire operation before ever contacting the defendant, they acquired food stamps and solicited the aid of a paid government informant to allure and entice the defendant into the illicit transaction. The government agent in providing "sine qua non" of the offense, in actuality created the crime. The only element which remained was for the defendant to accept the very attractive offer placed before him.

This was not a situation where the government's agents were merely attempting to investigate and undercover evidence of crime but rather their sole intention was to instigate and create crime. There is absolutely no evidence on the record that the government attempted to discover any additional evidence of criminal conduct other than related directly to the induced transactions. Such being the case, the defendant should properly have been arrested immediately after the first buy. It is therefore submitted for the court's consideration, that all subsequent solicitations made by Deputy Petronella were for the primary purpose of manufacturing predisposition on the part of the defendant in an attempt to defeat the anticipated defense of entrapment.

Based upon the uncontested facts in the case at bar, there is absolutely no rational basis for approving, justifying, or sanctioning this type of activity on the part of the government.

POINT V

IT WAS AN ABUSE OF JUDICIAL DISCRETION FOR THE TRIAL JUDGE TO PERMIT THE USE DURING THE TRIAL GOVERNMENT-PREPARED TRANSCRIPTS WHICH PURPORTED TO REPORT THE CONTENTS OF TAPED CONVERSATIONS HAD BETWEEN THE DEFENDANT AND DETECTIVE PETRONELLA ON FEBRUARY 25, 1977 and FEBRUARY 28, 1977, THE JUDGMENT SHOULD THEREFORE BE REVERSED.

The admission of accurate typewritten transcripts of sound recordings as an aid in listening to tape recordings, used contemporaneously with the introduction of the recordings into evidence, is not an absolute right, but rather, a matter within the sound judicial discretion of the trial justice. United States v. Koska, 443 F.2d 1167 (2d Cir. 1971). Among the factors which the court must take into consideration in exercising its discretion are 1) whether the transcripts accurately reflect the tape recordings and the actual conversation had between the parties, 2) whether there is a showing of a particularized need for the use of the transcripts, and 3) that the use of the transcripts will not result in any undue prejudice to the defendant.

With respect to the first factor, it is the defendant's contention that the transcripts do not accurately reflect the conversations had between the parties, in that portions of the recordings were either omitted or transposed as is evidenced by the noticeable stops, gaps, and breaks in the recordings.

While Deputy Petronella testified that government exhibit No.5, the purported transcript of the conversation had on February 25, 1977, reflected exactly what happened on that day,the defendant testified that it did not. The fact remains however that an unintelligible portion of the tape was referenced at the beginning of that transcript. The defendant testified that at this point ificant portion of their conversation was omitted,during . Petronella stated "I understand you want Food Stamps", and the defendant replied again that he was not interested. It is obvious that there was an omission, because the next line which is attributed to Petronella, "I know, I mean I don't dig come in with 'em. That's why" does not at all follow from the context of the opening remarks. Further it is the defendant's contention that the previous line should have read "I know, I mean I don't dig coming in with him. That's why",referring to the informant. It is of extreme importance to note at this point,that following the aforementioned statement by Detective Petronella, the tape obviously reflected a volley of laughter in the immediate presence of the defendant and Petronella. It was also obvious that the voice and tone of the laughter was easily distinguishable from that of either the defendant or Deputy Petronella, yet no reference to same was included on the transcript.(220).

This was a crucial point in that Petronella testified that he and the defendant were alone during the conversation and that the informant had left prior to his entering the collision shop. Petronella's testimony was directly contradicted by the defendant who testified that the informant was present during the

entire transaction. The informant's presence is further corroborated by the informant's statement a few lines later, wherein he referred to the defendant in the person saying, "well he's talking fifty cents".

The defendant also gave testimony that the transcripts and tapes made no reference to Deputy Petronella's attempts to trade stamps for the defendant's gun or any other guns or merchandise, or his inducement to have the defendant call his friends to see if they were interested in the stamps. In Koska, Supra. there was no question as to the accuracy of the transcripts as same was stipulated to by the parties. The same was also true in the case of United State v. Turner, 528 F.2d 143, 9th Cir.1975. However in United States v. Bryant, 480 F.2d 785, 2d Cir. 1973, where there was no such stipulation, but instead, a question as to the accuracy of the transcripts, this court held that it was error to allow the transcripts to be used as an aid. In United States v. Chiarizio, 525 F.2d 280, 2d Cir. 1975 citing Bryant Supra, the court stated:

> "This court has explicitly held that the submission of a transcript from tape recordings is not permitted when one side objects to the content of the transcript as inaccurate". at page 293.

Second, there was no showing of a particularized need for the use of a transcript as an aid, and in fact, there was no such need. Unlike Koska, Supra, where the tape recordings were approximately five hours in duration and the transcript was necessary as an aid in order for the jury to be able to assimilate and review the lengthy dialog between the parties, and Bryant

Supra, which similarly involved the introduction of transcripts of very lengthy tapes; in the instant case, the total duration of the two tapes was only approximately six minutes. In addition, there were only 2 participants to the conversation and the tapes were of sufficient clarity to be easily understood by the jury.

Third, there being no overiding need for an introduction of the transcripts, the defendant was therefore unnecessarily and unduly prejudiced in that the only effective purpose served by the introduction of the transcripts was to reinforce and re-emphasize the tapes as accurately reflecting the government's version of what transpired during the two conversations, while at the same time minimizing and clouding the defendant's contentions with regard to the accuracy and completeness of the tape and the presence of a third person. Despite the trial court's limiting and precautionary instructions, the transcript served only to distract the jurors from listening to what was actually being played on the tapes, especially the various gaps, breaks and stops, which might indicate that the tapes were altered or that the recording device was turned on and off during the conversation.

Although the trial court admonished the jury to rely only on what they heard on the tape recording, and not what they read on the transcript, that only the tape recording was evidence, not the transcript, and that the transcript was only to be used in effect as a guide to aid them in listening to the tape, (41-42, 194 -195), it is quite obvious that they did not understand those instructions. After the jury had retired and begun its

deliberation, the Foreman sent a note to the judge stating "transcripts of testimony between Jones, Petronella on 2/25/77 requested". When asked by court to make more specific their request, the Foreman stated "we would like to go over the transcripts of the tape that we viewed earlier".(18) That request demonstrated the confusion created by the introduction of the transcripts and the inability on the part of the jury to understand a fairly simple concept and to follow instructions,and most importantly the fact that the transcript was misused,afforded a certain weight as if it were evidence, while distracing the jury from the actual tape recording. It is therefore clear that the precautionary and limiting instructions failed to eliminate the harmful and prejudicial effect caused by the introduction of the tapes.

POINT VI

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE CONVERSATIONS ALLEGEDLY HAD BETWEEN THE DEFENDANT AND DETECTIVE PETRONELLA ON March 8,1977 and March 9, 1977, AND FURTHER ERRED IN FAILING TO GIVE A PROPER LIMITING INSTRUCTION AND THE JUDGMENT SHOULD THEREFORE BE REVERSED.

The Trial Court moved that the evidence was admissable to show motive, intent and knowledge, but not admissable at that point to show predisposition on the part of the defendant.

Relying upon Rule 403 of the Federal Rules of Procedure which states:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues,or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Itis contended that the introduction of said evidence was an abuse of discretion on the part of the Trial Court.

Precisely, it is submitted that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of issues, and the possibility of misleading the jury.

The Trial Justice was informed as early as the Pre Trial Conference that the defendant for his defense was relying solely on the theory of entrapment. A memorandum on entrapment was

submitted to His Honor at that time. It is well settled that the raising of the defense of entrapment, in effect, precludes a denial that the alleged criminal activity occurred. The fact that this was the sole defense relied upon by the defendant was asserted throughout the discovery proceedings of voir dire,and the trial.

There was never any question but that the alleged criminal transactions took place as the evidence was overwhelmingly in favor of the government. The defendant at no time denied that he had purchased the stamps,nor was there ever any indication that he would make such a denial. The defendant waived his privilege and testified that he made the purchases and that he knew that what he was doing was illegal.

Being that the defendant was not contesting that he knowingly and intentionally engaged in the transaction, the independent evidence of a more probative and less prejudicial nature was more than sufficient to carry the burden of proof, even if the issue had been contested. It is also submitted that the Trial Court failed to consider the fact that this evidence was strongly disputed and that there was no clear and convincing proof that these conversations took place, and if they did, as to the content of the conversations.

Where the probative value of certain evidence may be very slight while its prejudicial character may be very strong, the Trial Judge has a duty in the exercise of his discretion to exclude it. United States v. Knohl, 379 F.2d 427 - 438, 1967; Spencer v. State of Texas, 385 US 554,560; 87 Supreme Court 648,652; 17 L.Ed 2d 606,1967; U.S. v. Bird, 352 F.2d 570,574

(2d Cir. 1965).

In reaching a decision as to whether or not to exclude on the grounds of unfair prejudice, consideration must be given to the probable effectiveness or lack of effectiveness of a limiting instruction. Bruton v. U.S., 389 US 818; 88 Supreme Court 126; 19 L. Ed.2d 70, 1968.

The court indicated that a limiting instruction would be given, however said instruction was not presented until after the evidence was submitted to the jury.

The purpose of the limiting instruction as stated by the court was to impress upon the jury that this evidence was to be admitted only as bearing on the issues of the defendant's intent, knowledge and motive on February 25th and February 28th 1977,and not to be considered as evidence of predisposition on the part of the defendant and not bearing on the defense of entrapment.

It is argued that this was a very difficult distinction for the jury to understand and make.

In its instruction the court emphasized that the conversations were to be admitted as bearing on the question of intent. Yet, the court referred to the question of intent in both its statement as to the government's burden in stating that:

> "...it is necessary for the government to prove that in connection with the alleged criminal activity,that there was a certain intent and knowledge on the part of Mr.Jones...", [227].

and when referring to the defendant's defense of entrapment, in stating:

> "that Mr.Jones is claiming or will claim that he

had no disposition or intent or other inclination to get into this type of activity...". [227]

Such references only serve to further confuse the jury with respect to a distinction already most difficult to make and possibly beyond their ability to grasp, as indicated by their failure to follow a less difficult limiting instruction with respect to the taped transcripts. The admission into evidence of the subsequent phone calls without any real need, raises a very real danger that the evidence will cause unnecessary confusion as to the issues of intent and predisposition and that it may be misapplied to the question of the defendant's predisposition which was the only substantial issue for the jury to decide.

POINT NO. VII

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN STRIKING RUSSEL BAKER'S CHARACTER EVIDENCE BY TESTIMONY IN THE FORM OF OPINION, AND IN FAILING TO PERMIT EVIDENCE RELATING TO THE APPELLANT'S PRIOR COOPERATION WITH LAW ENFORCEMENT OFFICIALS AS EVIDENCE NEGATING PREDISPOSITION AND THE JUDGMENT SHOULD BE REVERSED.

This Court has held that the question of entrapment should not go to the jury unless evidence is introduced negating the defendant's propensity. U.S. v. Riley supra, 363 F.2d at 959; U.S. v. Henry supra, 417 F. 2d at 269.

As stated in Sherman supra:

"In so raising the defense of entrapment, the defendant necessarily invites an "appropriate and searching inquiry into his own conduct and predisposition" as bearing on his claim of innocence". 356 U.S. at 373.

Necessarily, proof of state of mind prior to the initial contact must be considered to determine whether the accused should be determined an unwary innocent or an unwary criminal. Having raised the issue of entrapment, the defendant's character and prior conduct become a vital and relevant issue.

Where, as in the instant case, character itself is an element of a crime, claim or defense, there is no problem as to the general relevancy of character evidence, and Rule 404 of the

Federal Rules of Evidence therefore has no provision on the subject. Although the Federal Rules of Evidence make inadmissible evidence of other crimes, wrongs or acts to prove the character of a person in order to show that he acted in conformity therewith, a basic exception to that Rule permits the accused to introduce evidence of his own good character, which of course the prosecution may then rebut. Rule 404, Advisory Committee's note, Sub. a.

In addition, the Federal Rules of Evidence no longer confine character witnesses for the defendant to testifying in vague generalities about the defendant's reputation in the community, but rather may express their own opinions. Also,where, as in the instant case, the character of the accused is an essential element of this defense, proof may also be made by specific instances of his conduct. Rule 405, See also Advisory Committee's note.

It is therefore submitted that the trial court substantially prejudiced the defendant's case in striking and instructing the jury to ignore the character testimony in the form of an opinion by Russel Baker, a Detective with the City of Buffalo Police Department. (77-82).

Through Mr. Baker the defense also intended to introduce proof of the good character of the defendant by specific instances of conduct relating to the defendant's history of full and complete cooperation with the City of Buffalo Police Department. Of particular significance was evidence that information provided by the defendant led to the arrest and conviction of one Isiah Reed, who had attempted to sell stolen merchandise to

the defendant. Such evidence was highly relevant to the question of the defendant's character and predisposition to engage in the type of activity with which he was charged; therefore the trial court's refusal to accept the proffer irreparably prejudiced the defense.

POINT VIII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO THE LAW AND JUDGMENT SHOULD BE REVERSED.

The Court is precluded from making any statement as to the law during the course of the proceedings that would be improper when charging the jury.

When during the course of the voir dire the Court first discussed the theory of entrapment, it stated:

"I would tell the jury that the government had a burden to prove that there was a disposition on the part of Mr. Jones to engage in this activity and that he did not get pushed into it or enticed into it solely because - solely or mainly because of the government activities,...". [11] Emphasis added.

Later in the voir dire, referring to the defense of entrapment, the Court stated:

"There might be a question of whether Mr. Jones was entrapped in this, whether he, not having any prior disposition or willingness to engage in something illegal along these lines was nevertheless coerced and urged into it by a government agent,... ." [12] Emphasis added.

In its next reference to entrapment during the voir dire, the Court stated:

"And if, as I think I will, I will inform you that the Government also has the burden of proving that there was no entrapment, that this crime did not come about because Mr. Jones was coerced into it or urged into it by the Government, if I tell you that the Government has a certain burden of proving that mainly beyond a reasonable doubt proving either there wasn't any urging or that Mr. Jones had a predilection, a predisposition

to engage in it, would you accept that and follow that?" [13-14] Emphasis added.

The Court in its last discussion of entrapment during the voir dire, stated that Mr. Wagner must prove:

" ...there was no entrapment and Mr. Jones was not led into or urged into this on the part of the Government or that he had a predisposition or that he did have a predisposition to commit this particular crime. Now, if Mr. Wagner proves that there was no urging that he proves that beyond a reasonable doubt and he proves all of the other elements would you have any reluctance to find Mr. Jones guilty?" [24] Emphasis added.

In the Court's only reference to the theory of entrapment during the course of the trial, it again misstated the appropriate law:

"And as I again will tell you later, the defense of entrapment can be met and must be met by Mr. Wagner of showing either that there was no such entrapment or urging or leading Mr. Jones into it or that Mr. Jones had a predisposition, a willingness prior to that time to engage in that type of activity. And if the Government shows either of those circumstances beyond a reasonable doubt, and of course, I will tell you more about that level of proof later, the defense of entrapment is not available for Mr. Jones." [57-58] Emphasis added.

It is contended that the aforementioned instructions were clearly erroneous and created, throughout the entire proceeding, a lasting impression in the minds of the jurors in literally stating that the defense of entrapment was not available to the Defendant if he was not pushed, forced, coerced, or urged into the criminal activity. These instructions affected the fundamental

fairness of the trial and thereby constituted plain error.

For the reasons set forth in Point III of this Brief the Court erred in not instructing the jury that:

"Evidence of the Defendant's willingness to participate in a criminal activity by itself is insufficient to overcome the defense of entrapment." [214]

As discussed in Point III, mere willingness to engage in a criminal activity, without more, is insufficient to support an inference that the Defendant was predisposed. Apparently, the Court's admission that it could not see "a substantial difference, if any difference, between willingness and predisposition" was fatal to the Defendant's request. [314-315]

Again citing Point III of this Brief, the Court erred in not charging the jury that:

"Entrapment occurs when the original criminal conduct is the product of the creative activity of the law enforcement officials, that is, when the criminal plan originates in the mind of the government agents and not in the mind of the accused." [207-208]

The Court committed plain error in not instructing the jury that Government initiation or inducement had been established as a matter of law, thereby substantially prejudicing the Defendant's case, in that it only created unnecessary confusion when the only question to be considered was that of predisposition.

Evidence having been presented that the informant was an active ingredient in the inducement, and a participant to the first transaction, in addition to there being a question as to the informant's true identity, the Government's failure to have Riley testify to either support or contradict the Defendant's testimony precluded a reasonable inquiry into the question of entrapment.

Riley was not a neutral witness, but a special employee of the Government. Although Riley was made available to the defense for an interview, he was instructed that he did not have to talk to the defense if he did not want to; and consequently, refused to discuss with the defense any aspect relating to his involvement or lack of involvement with the Defendant or with regard to the related cases. Therefore, he was not in realty equally available to both sides, except in a physical sense. Forcing the defense to call Riley as its own witness was, in effect, a subtle attempt to shift to the Defendant the burden of proving his own innocence.

The prosecution, rather than putting Riley on the stand to testify that he was the informant used in the instant case, subpoenaed Ronnie Manns, who was at that time incarcerated at the Erie County Penitentiary at Alden, New York.

Manns first testified that he knew the Defendant because he had once gone to the Defendant's shop for an estimate sometime prior to the storm and also on just one other occasion sometime after the storm, maybe in May. That he never worked as an informant and that he wasn't at the Defendant's collision shop on February 25, 1977. [139-143] In a cross-examination, Riley admitted that the Defendant had previously accused him of setting the Defendant up on the 25th and also that he had lied when he told the Defendant that he was in jail on that date. He later admitted that he had been to the Defendant's premises at least three to four times. [144-146]

The Government's strong resistance to putting Riley on the witness stand to deny the Defendant's allegations, despite the

fact that he was standing by in another part of the courthouse, indicates strongly that his testimony could only have been damaging to the government's case.

Noting that this court stated in United States v. Jones supra, that:

> "We do not look with favor on attempts by the prosecutors to restrict full examination of the government's relations with special employees when this is relevant to the question of inducement of the illegal conduct." 360 F 2d at 96.

It is agreed that in light of the unique factual situation presented in the instant case that the defendant was entitled to its requested instruction that:

> "If the informant's testimony would tend to disprove the defendant's version of the facts, it is the responsibility of the government to produce the informant to testify on the government's behalf." (209)

Or, at the very least, the defendant's carefully cushioned request that the jury may find that:

> "The government's failure to make appropriate disclosure of the facts peculiarly within its knowledge and necessary for a fair appraisal of the informant's part in any claimed inducement may preclude a reasonable inquiry on the part of the jury on the issue of entrapment." (213)

POINT IX

THE COURT ERRED IN PERMITTING THE PROSECUTION TO USE TAPE TRANSCRIPTS DURING CROSS EXAMINATION AND SUMMATION AND FURTHER ERRED IN ALLOWING THE PROSECUTION TO IMPROPERLY CHARACTERIZE THE DEFENDANT'S TESTIMONY AND MISSTATE THE LAW OF ENTRAPMENT THEREBY MISLEADING THE JURY; AND JUDGMENT SHOULD THEREFORE BE REVERSED.

The court erred in permitting the prosecution to use the tape transcripts in its cross examination of the defendant and its summation after having admitted their use for the sole purpose of aiding the jury while listening to the tapes.

After the prosecutor asked the defendant if the tape transcript,(government exhibit No.5),was an accurate copy of the conversation had on the 25th, he then began reading directly from the transcript questioning the defendant line by line, once again asking him if the transcript was essentially correct. He then continued questioning line by line and one more time asked the defendant whether the transcript and the tape were similar. (108-114). Proceeding to the events of the 28th,the defendant was again asked if he viewed the transcript of that tape, and then Mr. Wagner proceeded to question the defendant line by line continually referring to the transcript. (115-118-119-125)

Finally Mr. Wagner handed the defendant a copy of government exhibit 5 and asked him to point out where in the conversation he had resisted Mr.Petronella's effort to sell stamps. Over an objection by the defense, the court directed the defendant to answer the prosecutor's questions which continued to re-

fer to the transcript and also required the defendant to refer to the transcript. At one point, specifically asking the defendant,

> "What else in the transcript, sir, or where else in that transcript did you resist/buying the food stamps from Mr.Petronella?" (130-137)

Then Mr. Wagner handed the defendant a copy of government's exhibit No.6, the transcript of the February 28th conversation, and again requested the defendant to tell the jury where on the transcript he resisted Mr.Petronella's efforts, at one point saying :

> "Where else in the transcript does it say sir,anything about resisting Mr. Petronella?" (132)

Again during Mr. Wagner's summation, explicitly referring to the fact that he was using the transcripts, read through both transcripts, commenting line by line. (152-166)

It is therefore submitted that even if the transcripts were properly admitted as an aid to the jury in listening to the tapes the prosecution greatly exceeded the permissable limits of their use. This situation is a perfect example of the problems involved in admitting an item to be used for a limited purpose.The tapes were, in effect, used as evidence by Mr.Wagner in an attempt to impeach the defendant's testimony.

The court further erred in allowing the prosecution over the defendant's objection to characterize the defendant as claiming that he was forced into the conduct and characterizing entrapment as the defendant having to be forced or coerced, or to have his will overcome by the police,and continually characterizing the

defendant as not having exhibited any significant resistance to the transaction. (150-151). Again asserting that the defendant wants the jury to believe that he would not have done it except for the fact that the government agent pressured him into it. (162).

Although Mr. Wagner was possibly merely following the tone of the court's previous instructions, he too was misstating the law with respect to entrapment and clouding and confusing the issue of predisposition. Having insufficient evidence to meet the heavy burden necessary to establish the defendant's ready compliance as discussed in part III of this brief, the prosecution has attempted to mislead the jury into believing that the defendant's predisposition could be established if there was not sufficient evidence of his resistance to the inducement, or that he was urged, forced or coersed into the activity. This, once again, was an attempt by the prosecution to shift upon the defendant the burden of proving that he was entrapped.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT OF THE DISTRICT COURT MUST BE REVERSED, WITH INSTRUCTIONS THAT THE INDICTMENT BE DISMISSED.

Respectfully submitted,

PETER L. COSTA
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA

Plaintiff-Appellee,

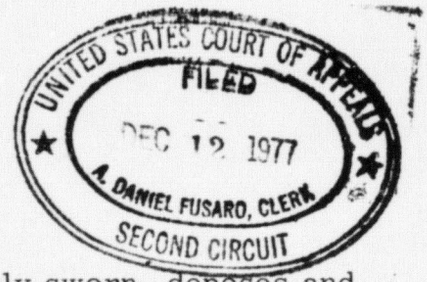
vs.

RAY JONES,

Defendant-Appellant

AFFIDAVIT OF
SERVICE BY MAIL

77-1424



STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

, being duly sworn, deposes and says:

That deponent is not a party to this action and is over 18 years of age; that on the 29th day of November , 1977 , deponent served 10 copies of Brief for Appellant and Appendix for Appellant upon,

A. Daniel Fusaro, Esq.
U. S. Court House
Foley Square
New York, New York 10007

at the above address by depositing a true copy or copies of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Sworn to before me this
29th day of November
1977.

Rosemary O'Halloran
Commissioner of Deeds
Buffalo, New York

My Commission Expires Dec. 31, 19 78